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IN THE
Supreme Court of the United States

TRANS-SPEC TRUCK SERVICE, INC.
D/B/A TRUCK SERVICE,
Petitioner,

v.

CATERPILLAR INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

REPLY BRIEF TO CATERPILLAR INC.'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: September 3, 2008

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ARGUMENT

Pursuant to Rule 15.6, Trans-Spec Truck Service, Inc. ("Trans-Spec") hereby submits the following reply brief addressed to new points raised in the brief in opposition filed by Caterpillar Inc. ("Caterpillar").[1]

I. The Appeals Court erred to create a new pleading and dismissal standard in the First Circuit by eliminating Trans-Spec's right to rebut Caterpillar's affirmative defenses and by affirming dismissal of Trans-Spec's viable claims.

Caterpillar notes that it put Trans-Spec on notice of its affirmative defense based on the statute of limitations by raising it in boilerplate fashion in its answer. Opposition at 10, 21. That does not alter the fact that, under the lower courts' various rulings, Trans-Spec never had an opportunity to rebut that affirmative defense, as was its right. *See* Petition at 12-13.

Moreover, as Trans-Spec noted on page 7 of its Petition, Caterpillar's affirmative defense arguably applied to Trans-Spec's implied warranty claims, in

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[1] Caterpillar relies on invective throughout its brief in an attempt to distract this Court from the merits of Trans-Spec's petition, but fails to proffer sound reasoning to support many of its statements. Caterpillar also forgets that apples do not become oranges simply by argument. Trans-Spec briefly addresses Caterpillar's more troubled or simply erroneous arguments in this reply, but ignores Caterpillar's admittedly amusing attacks, including statements belittling the reading abilities of Trans-Spec's counsel.

the event that the Court disfavored Trans-Spec's tolling and waiver arguments in rebuttal. Trans-Spec could not anticipate, however, that the Magistrate Judge would apply the affirmative defense inappropriately, in the manner that she did, to a warranty which Caterpillar repeatedly conceded was an express warranty of future performance.

Prior to moving for dismissal, Caterpillar conceded in an answer to interrogatory, "Caterpillar's express warranties provided, in part, that if a defect in material or workmanship is found during the extended (5-year or 500,000 miles) warranty period applicable to certain components and assemblies specified in the warranties, Caterpillar will . . . correct the defect." RA152.[2] That is the very definition of a warranty of future performance. Caterpillar's Manager of Technical Support further conceded by affidavit, again served prior to Caterpillar's motion to dismiss, that the "extended warranty on each engine ends either on December 8, 2004 (for the engines delivered on December 8, 1999) or January 14, 2005 (for the engines delivered on January 15, 2000)." RA112E. Caterpillar's Motion to Dismiss conceded that the Five Year Warranty comprised an "express warranty", RA225, 233, but never identified it as a repair or replace warranty. Caterpillar began

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[2] Trans-Spec provides cites to the Record Appendix in the Appeals Court matter as RA[page number]. Trans-Spec did not provide Record Appendix cites in its Petition because this Court does not receive a copy of the Record Appendix in determining whether to grant a Petition for Writ of Certiorari. Should the Court wish, Trans-Spec is more than happy to provide Record Appendix cites for any and all propositions made in the Petition.

interpreting the Five Year Warranty as a repair or replace warranty only after the Magistrate Judge identified it as such on her own. Caterpillar claims that Trans-Spec "did not read its own exhibit," Opposition at 14, yet it interpreted that exhibit, a warranty which it drafted, exactly as had Trans-Spec. *See* RA112E, 152.

Caterpillar cites a string of inapplicable cases on pages 10-11 of its Opposition. Whether a court should dismiss a complaint under Rule 12(b)(6) on statute of limitations grounds if the averments of the complaint, accepted as true, show it is time-barred is not at issue here. The appropriateness of dismissal in such a case is well-settled. *See* Petition at 10.

On the face of Trans-Spec's complaint, however, time-bar was *not* apparent. Trans-Spec referred to multiple express warranties.[3] Trans-Spec attached one of these warranties to its complaint. Caterpillar

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[3] Among other things, Trans-Spec alleged in its Complaint at RA062:

> 38. Caterpillar made express warranties . . . that the engines, and specifically their crankshaft seals, flywheel housings, and cylinder block casting, were to be covered for repair or replacement. Caterpillar drafted these warranties. All of these warranties were relied upon by Plaintiff.
>
> 39. Said warranties were breached by Caterpillar and the engines were not merchantable, not fit for the ordinary purposes for which they are used, not fit for the particular purposes for which they are used at the time of the accident, and not repaired when they broke.

identified and treated this warranty as one of future performance (at least, it did so until the Magistrate Judge's ruling). Another warranty Caterpillar gave Trans-Spec, the language and applicability of which has never been in dispute, stated that, "Caterpillar . . . warrants new . . . C-12 . . . engines sold by it for use in powering on-highway vehicles . . . to be free from defects in material and workmanship" for a "*standard warranty period*"" of "24 months after the date of delivery", before it described the Extended Warranty, under which "parts are warranted against defects in material and workmanship for 60 months or 500,000 miles . . . whichever occurs first[.]"[4] RA428, 430. All of this language comprises, by definition, warranties of future performance. Trans-Spec also referred in its complaint to several implied warranties, admittedly outside of the statute of limitations except for Trans-Spec's rebuttal argument. Trans-Spec had the right to rebut Caterpillar's affirmative defense as to all of its warranty claims. *See* Petition at 10-17. Trans-Spec did so by proffering waiver and tolling arguments.

Caterpillar errs to say Trans-Spec has not addressed the Appeals Court's opinion that Trans-Spec waived argument as to the Magistrate Judge's, District Court Judge's, and Appeals Court's refusal

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[4] Inexplicably, the Appeals Court, at A. 16a n.6, claims that Trans-Spec did not point out to it this language, *but see* Trans-Spec Brief at 6 (in bold in the original: "**The Two Year Warranty defines the Five Year Warranty as an 'Extended Warranty' under which 'parts are warranted against defects in material and workmanship for 60 months or 500,000 miles . . . whichever occurs first[.]'**"); cross-reference cited again at 16 and 17, and again in Trans-Spec's Reply Brief at 12 and 20 (quoting the relevant language).

to consider extrinsic materials, *see* Opposition at 14. Trans-Spec addressed this point at footnote 4 on pages 11-12 of its Petition.

Caterpillar likewise misrepresents at page 15 of its Opposition that Trans-Spec identifies no mistake of law with respect to the refusal by the District Court to examine extrinsic materials submitted in opposition to the motion to dismiss. *Compare* Petition at 10-17.

Caterpillar criticizes the extrinsic materials submitted by Trans-Spec as of "unclear admissibility or relevance" and "consisting of items that could reasonably have been found to have been withheld by Trans-Spec until then for perceived self-serving purposes rather than for any objectively good reason." Opposition at 15-16. The extrinsic materials submitted by Trans-Spec in its Objection to the Magistrate Judge's report included, but were not limited to, Caterpillar's Five Year Warranty, Caterpillar's Limited Warranty (which stated that "parts are warranted against defects in material and workmanship for 60 months or 500,000 miles . . . whichever occurs first"), Rule 30(b)(6) deposition testimony of Caterpillar taken after the parties filed their initial memoranda of law regarding Caterpillar's Motion to Dismiss, deposition testimony of a Caterpillar agent, and a Caterpillar patent which Caterpillar should have, but did not, produce. RA425-37, 449-54, 477-78. Trans-Spec did not withhold these materials, and Trans-Spec fails to understand how Caterpillar's on point documents and testimony were inadmissible, irrelevant, or not reliable.

Multiple times through its Opposition, Caterpillar states, without further explanation, that Trans-Spec tried to gain an "unfair procedural advantage." Opposition at 15; *see also* 16. Trans-Spec acted appropriately, and is perplexed as to what "unfair procedural advantage" Caterpillar thinks it sought or gained here. Trans-Spec treated the Five Year Warranty exactly as Caterpillar previously had: as a warranty of future performance. Trans-Spec had the right to rebut Caterpillar's affirmative defense and it attempted to do so. When the Magistrate Judge issued her Report and Recommendations, Trans-Spec responded accordingly, and proffered additional materials to reply to her erroneous interpretation. Trans-Spec also immediately sought to amend its complaint so as to cure any purported deficiencies.[5]

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[5] *See also* Caterpillar's accusation that Trans-Spec sought to aver different sets of facts. Opposition at 23. Rebutting an affirmative defense, and relying on defendant's own warranty documents, affidavits, deposition testimony, answers to interrogatories, and statements in motions to do so, or to interpret a warranty document at issue, is far different from being an inconsistent plaintiff casting about in search of a viable set of facts. Trans-Spec's Motion to Amend was replete with cites from Caterpillar's Rule 30(b)(6) deposition, and attached portions of the transcript of Caterpillar's Rule 30(b)(6) deposition along with the Caterpillar-drafted Limited Warranty document. RA511-524, along with the reports of Trans-Spec's two experts, RA525-548. Other allegations pertaining to Trans-Spec's tolling and waiver arguments are supported by deposition testimony, under oath, of Trans-Spec officers and a Caterpillar agent, as well as Trans-Spec's Answers to Interrogatories, all dated before Trans-Spec's Motion to Amend, regarding assurances made and actions taken by Caterpillar. RA260, 313-318, 477-79, 697-698, 1043-1045. On the other hand, Caterpillar flip-flopped on what its warranties mean. Caterpillar even went so far as to say the following language "is not a warranty of future performance."

II. **The Appeals Court erred to create a new standard in the First Circuit, and departed from the accepted and usual course of judicial proceedings, by: (a) not allowing Trans-Spec leave to amend its complaint where it quickly sought to do so in response to dismissal of its complaint; (b) disregarding that Trans-Spec met the Rule 16(b) standard under those circumstances, *see Inge v. Rock Financial Corporation*, 281 F.3d 613 (6th Cir. 2002); and, (c) ignoring that Caterpillar's own late filing of its Motion to Dismiss made it *impossible* for Trans-Spec to move for leave to amend to cure any purported deficiencies raised by that Motion prior to the deadline to do so.**

Caterpillar cites a string of cases at page 17 of its Opposition for the non-disputed, but inapplicable, general proposition that once the Rule 16(b) deadline for amendments to the scheduling order has passed, a party may not move to amend its pleading without first establishing good cause for relief from the Rule 16(b) order. These cases involve garden variety motions to amend, e.g., to add new claims or additional defendants.

Here, Trans-Spec moved for leave to amend its complaint in response to dismissal based on purported deficiencies raised by Caterpillar's Motion

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Caterpillar Appeals Brief. n.4. p. 21: "Caterpillar . . . warrants new . . . C-12 . . . engines sold by it for use in powering on-highway vehicles . . . to be free from defects in material and workmanship" for "24 months[.]" If that language does not comprise a warranty of future performance, what does?

to Dismiss. Caterpillar notes that Caterpillar filed its second amended complaint on May 24, 2005, and concedes that Counts I and II of this amended complaint – the counts dismissed pursuant to the Motion to Dismiss – were "identical" to those in Trans-Spec's earlier complaint. Opposition at 5. Caterpillar fails to proffer any reason, much less a good one, as to why it failed to move timely to dismiss Counts I and II of Trans-Spec's earlier complaint. Counts I and II were the only ones truly at issue in the Motion to Dismiss. Caterpillar vigorously opposed Trans-Spec's motion to amend its complaint to add a third count, negligence, against Caterpillar. The Magistrate Judge disfavored Caterpillar's futility argument and, accordingly, granted Trans-Spec leave to amend.[6] Caterpillar knew that the Court likely would not dismiss a count after granting leave to amend the complaint to add that very same count. The fact remains that absolutely *no good reason* existed as to why Caterpillar did not move to dismiss Counts I and II within the deadline to do so. *That* is the reason why Caterpillar has not proffered an explanation for its

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[6] Trans-Spec is surprised that Caterpillar cites the Magistrate Judge's Order on this point. Caterpillar observes that the Magistrate Judge allowed Trans-Spec to file a motion to amend eight day late. Opposition at 5. As the Magistrate Judge also noted, discovery problems, caused by Caterpillar's withholding of documents, caused the late filing. The Magistrate Judge thus held, "given the on-going discovery dispute and the fact that Trans-Spec filed its motion to amend only eight days late, the Court can not say that Trans-Spec has not been assiduously pursuing its claims." RA0185. Trans-Spec did not want to bring its motion to add a negligence claim until it had obtained sufficient information from Caterpillar to support that claim. Trans-Spec was simply trying to play within the procedural rules.

failure. In short, Caterpillar caught a luck break, and the rule of law should not turn on lucky breaks.

The string of cases Caterpillar cites on pages 18-19 of its Opposition do not address what happened here. These cases fail to discuss, much less set forth a unanimous governing procedure, where a plaintiff seeks post-dismissal leave to amend its complaint when the defendant filed its motion to dismiss on or after the scheduling order deadline for motions to amend and motions to dismiss. Under the Appeals Court opinion in this case, at least in the First Circuit, where a defendant files a motion to dismiss on or after the scheduling order deadline, a plaintiff's right to move to amend to cure purported deficiencies is eliminated as untimely and as insufficient good cause under Rule 16(b). For the sake of procedural clarity and uniform practice among the Circuits, this unsettled matter needs to be resolved by this Court.

Moreover, even some of the cases Caterpillar cites hold that an untimely motion to amend, filed in response to a motion to dismiss, meets the Rule 16(b) standard. For example, in *Inge v. Rock Financial Corporation*, 281 F.3d 613 (6th Cir. 2002), the Appeals Court addressed a situation in which a plaintiff filed late a motion to amend in response to defendant's motion to dismiss. *Id.* at 616. The district court denied the motion to amend as untimely because the plaintiff failed to show good cause under Rule 16(b) for modifying the amendment deadline set in the scheduling order. *Id.* at 617. The Court in *Inge* reversed the district court, ordered that the plaintiff be allowed to file an

amended complaint, found that good cause existed, and added that, "because Plaintiff's request to amend was a prompt effort to remedy pleading deficiencies identified by the district court in the dismissal order—as opposed to an effort to add new claims or parties—we envision no prejudice to Defendant from granting leave to amend." *Id.* at 626. The *Inge* opinion certainly conflicts with the First Circuit's opinion here.

Caterpillar misrepresents Trans-Spec's position to claim that, under Trans-Spec's theory set forth in its Petition, a motion to amend brought after dismissal of a complaint would somehow be subject to a more relaxed standard than a motion to amend brought before dismissal. Opposition at 19. Caterpillar's statement makes no sense, and Trans-Spec said no such thing. The same test – that the proposed amended complaint sufficiently states a valid cause of action – should apply in either case.

Caterpillar also criticizes that Trans-Spec did not earlier move the Court to extend the Rule 16(b) scheduling order deadline for amendment of the pleadings. Opposition at 6. Trans-Spec did not do so because no need arose until the Magistrate Judge issued her report. Trans-Spec did not intend to add any new parties or claims. Also, if necessary for some unforeseen reason, Trans-Spec could have moved at a later date under Rule 15 for an amendment to conform to the evidence.

CONCLUSION

For the above foregoing reasons, Petitioner Trans-Spec Truck Service, Inc. respectfully requests the issuance of a writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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